Bujang bin Mat & Anor v Lai Tzen Hai & Anor

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–21 OF 2003 III(I)
CLEMENT SKINNER J
3 AUGUST 2004

Tort — Damages — Personal injuries — Liability — Causing sudden danger on road — Following too closely at unsafe speed — Apportionment of liability — Contributory negligence — Nursing care — Whether correct multiplicand and multiplier used

Civil Procedure — Damages — General damages — Provision for contingency — Whether bound by Asainar bin Sainudin & Anor v Mohamad Salam Sidik

The plaintiffs commenced an action against the defendants to recover loss and damages for personal injuries suffered by them as a result of an accident involving the parties. The trial judge found the defendants 60% and the plaintiffs 40% liable. The trial judge also awarded special damages and general damages to the plaintiffs. The defendants as well as the plaintiffs are dissatisfied with the findings and thus the instant appeal and cross-appeal.

Held:

(1) On the issue of liability, the trial judge did not err or incorrectly appreciate the evidence before her. There was sufficient evidence on which the trial judge came to her findings (see para 19).

(2) Based on the evidence, it would not be wrong to say that the first defendant had created a sudden danger on the road by abruptly stopping the bus where he did, which was the main cause of the accident. Thus, the trial judge did not err when she found the first defendant 60% liable for the accident (see para 21).

(3) Again on evidence, the trial judge was fully entitled to find that the first plaintiff 40% liable as he was following the bus driven by the first defendant too closely at a speed which was not safe to do so and which prevented him from taking the necessary evasive action after the situation of danger created by the first defendant by suddenly stopping the bus (see para 23).

(4) The trial judge is not bound to follow *Asainar bin Sainudin & Anor v Mohamad Salam Sidik*, ie she must allow a 100% contingency to cater for increase in future costs, as the case was not laying down any principle of general application (see para 40).

[Bahasa Malaysia summary

Plaintif memulakan satu tindakan terhadap defendan untuk mendapat kembali kehilangan dan ganti rugi bagi kecederaan diri yang dialaminya disebabkan oleh kemalangan yang melibatkan kedua-dua pihak. Hakim bicara mendapati defendan 60% dan plaintif 40% bertanggungjawab. Hakim tersebut juga memberi award untuk ganti rugi khas dan ganti rugi umum kepada plaintif. Defendan dan plaintif tidak berpuas hati dengan keputusan tersebut dan membuat rayuan dan rayuan balas.

Diputuskan:

(1) Dalam isu mengenai liabiliti, hakim bicara tidak silap ataupun salah dalam menilai keterangan di hadapan beliau. Terdapat cukup keterangan pada mana hakim bicara boleh sampai ke keputusannya (lihat perenggan 19).

(2) Berdasarkan pada keterangan, tidak salah dikatakan bahawa defendan pertama menyebabkan bahaya yang mengejut di atas jalan dengan memberhentikan bas secara mengejut, yang mana merupakan penyebab utama kemalangan. Dari itu, hakim bicara tidak silap apabila beliau memutuskan yang defendan pertama bertanggungjawab 60% dalam perkara ini (lihat perenggan 21).

(3) Sekali lagi berdasarkan keterangan, hakim bicara berhak memutuskan bahawa plaintif pertama bertanggungjawab 40% dalam perkara ini kerana beliau telah mengikut terlalu dekat terlalu dekat bas yang dipandu oleh defendan pertama pada kadar kelajuan yang tidak selamat yang menghalang beliau dari dapat bertindak mengelak dari keadaan bahaya yang mana telah diujudkan oleh defendan pertama dengan memberhentikan bas secara mengejut (lihat perenggan 23).

(4) Hakim tersebut tidak terikat dengan kes *Asainar bin Sainudin & Anor v Mohamad Salam Sidik*, iaitu beliau mesti membenar 100% kontingensi untuk memenuhi kenaikan kos masa hadapan, kerana kes tersebut tidak menetapkan sebarang prinsip untuk kegunaan umum (lihat perenggan 40).]

Notes

For cases on damages for personal injuries, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 212–213.
For cases on general damages, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1932–1937.

Cases referred to

Abdul Bin Karim v Ahmad bin Abdullah [1991] 2 CLJ 1490 (refd)
Asainar bin Sainudin & Anor v Mohamad Salam bin Sidik (Suing through his representative Sidikbin Sarmidi) [2002] 5 MLJ 104 (refd)
Chandra Sekaran a/l Krishnan Nair & Anor v Ayub bin Mohamed & Anor [1994] MLJU 82 (refd)
Chandran v Mohammad Razali bin Jaafar [1992] MD 911 (refd)
De Cotta v Tan Hock Lee [1972] 2 MLJ 173 (refd)
Inderjeet Singh v Mazlan bin Jasman [1995] 2 MLJ 646 (refd)
Lim Poh Choo v Camden and Islington Area Health Authority [1979] 2 All ER 910 (refd)
Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99 (refd)
Mohd Yusof bin Abdul Ghani v Tee Song Kee & Anor [1995] MLJU 344 (refd)
Muhammad Milshaddiq bin Juri v Rahmat bin Jamil [1993] MLJU 418 (refd)
Nazori bin Teh & Anor v Teh Lye Seng & Anor [1996] 1 AMR 706 (refd)
Ng Chun Loi v Hadzir & Ors [1993] 1 CLJ 323 (refd)
Swee Boon King v Thong Tin Sing & Anor [1994] MD 1224 (refd)

Tan Ah Kan v The Government of Malaysia [1997] 2 AMR 1382 (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22 (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] 30 MLJ 87 (refd)
Waras Bin Beno v Khoo Hang Chuan & Anor [1991] 3 CLJ 2605 (refd)
Wong Li Fan William (an infant) v Haidawati bte Bolhen & Anor [1994] 2 MLJ 497 (refd)
Yu Mea Lian & Anor v Government of Terengganu & Ors [1997] MLJU 252 (refd)
Zainab bte Ahmad lwn Keretapi Tanah Melayu Bhd [2000] 5 MLJ 620 (refd)
Zamri Md Som & Anor v Nurul Fitriyaton Idawiyah Nahrawi [2002] 1 CLJ 309 (refd)

Legislation referred to

Highway Code r 22

Appeal from: Summons No 53–18–2001–III (Sessions Court, Kuching)

Shankar Ram (Shankar Ram & Co) for the plaintiffs/respondents.
Frank Tang (Tang & Partners) for the defendants/appellant.

Clement Skinner J:

[1] This is the hearing of an appeal and a cross-appeal against the decision of the learned sessions court judge, Kuching given on 21 April 2003 after a full trial. The action in the court below was brought by the first and second plaintiff to recover loss and damages for personal injuries suffered by them as a result of an accident which occurred on 10 July 2000 at 6½ mile Jalan Kuching–Serian, when a motorcycle driven by the first plaintiff with the second plaintiff riding as pillion, collided into the back of a bus driven by the first defendant and owned by the second defendant.

[2] The learned sessions court judge found that the first defendant was primarily responsible for the accident, but that the first plaintiff had contributed towards it. Accordingly the learned sessions court judge apportioned liability as follows: first defendant 60% to blame and the first plaintiff 40% to blame.

[3] With regard to the injuries suffered by the first and second plaintiff as a result of the accident, it will be sufficient to repeat here what the learned sessions court judge said about the matter in her judgment (at p 95 Record of Appeal):

> "Arising out of the said collision, the plaintiffs were thrown from the motorcycle with the first plaintiff suffering the more serious injuries ie severe brain damage described in Dr Lim Ming Ann's (PW1) report (exh Pl) as acute subdural haemorrhage on the left side of the brain with midline shift of 1.5 cm and punctuate haemorrhages around the brain stem. The said injuries were of such severity that the aftermath of the collision caused the first plaintiff to be in a vegetative state. In addition to the injuries to his brain the first plaintiff also suffered a 3-cm laceration wound over the right brow, a 2-cm laceration wound over his scrotum and a distal radius bone fracture. The second plaintiff was luckier. He escaped with only a closed fracture of his left patella bone which was treated, according to Dr Rajesh Asnani (PW4) in his report (exh.P9) with a cast of plaster of paris".

[4] For the injuries just described by her and their consequences, the learned sessions court judge assessed and awarded the first and second plaintiff the following amounts under various heads of damage:

(1)	Special Damages	
	first plaintiff	
	(a) Agreed special damages	RM 1,328
	(b) For various receipted items	RM 1,016
	(c) Pre-trial loss of income	RM48,000
	second plaintiff	
	(a) SGH receipts	RM 60
	(b) Pre-trial loss of income	RM 2,760
(2)	General Damages	
	first plaintiff	
	(a) Loss of amenities, pain and suffering	RM200,000
	(b) Future loss of income	RM240,000
	(c) Pre-trial nursing care	RM 26,000
	(d) Future nursing care	RM888,000
	second plaintiff	
	(a) Loss of amenities, pain and suffering	RM 8,000

[5] The learned sessions court judge also awarded interest on the special damages at 6% from the date of accident until date of judgment and thereafter at 8% per annum until full payment. For the general damages, she awarded interest at 8% per annum from the date of filing of the action until full and final settlement.

[6] The learned sessions court judge awarded costs to the plaintiffs to be taxed if not agreed.

[7] The first and second defendants as well as the first and second plaintiff's are dissatisfied with the learned sessions court judge's finding of liability and her award of damages, hence this appeal and cross-appeal.

[8] I will deal with the appeal and cross-appeal on liability first, but before doing so I should mention that for convenience I will continue to refer to the parties as they were in the court below.

APPEAL ON LIABILITY

[9] The learned sessions court judge apportioned liability at 60% against the first defendant because she came to a finding that he was more to blame for the accident as he "had made a sudden, unscheduled stop at the road bay without giving ample notice to the plaintiffs who were riding behind him and was therefore largely to be blamed for the said collision.".

[10] And the learned sessions court judge apportioned 40% blame for the accident to the first plaintiff because she came to a finding that "the plaintiffs being motorists travelling behind the bus bore some responsibility to keep a proper lookout for the vehicles in front of them and must not travel too closely to the bus so as to put themselves in so tight a situation that they would not be able to manoeuvre themselves out of an emergency situation arising in front."

[11] The first and second defendants now say that the learned sessions court judge was wrong in finding the first defendant 60% to blame as she should have found him, at most, only 20% to blame while she should have found the first plaintiff 80% to blame for the accident. Learned counsel for the first and second defendant submitted that the learned sessions court judge should have arrived at such a finding because there was evidence that just before the accident, while the first plaintiff was travelling at a speed of about 40–50 km/hr (or about 30 mph) he switched lanes (from right to left lane) after which he collided into the back of the bus driven by the first defendant. So according to the defendants, the first plaintiff was following far too closely behind the bus and so should bear the greater blame for the accident.

[12] Counsel for the defendants supported his submissions by reference to the case of *De Cotta v Tan Hock Lee* [1972] 2 MLJ 173 and other cases which followed *De Cotta*, such as *Abdul Bin Karim v Ahmad bin Abdullah* [1991] 2 CLJ 1490 and *Waras Bin Beno v Khoo Hang Chuan & Anor* [1991] 3 CLJ 2605. In *De Cotta*, r 22 of the Highway Code was applied, which stipulates that the following driver should allow at least one car's length between his car and the vehicle in front for every ten miles per hour of its speed and, according to Bingham's Motor Claims Cases, the distance should be double in the case of a two-wheel vehicle.

[13] For the plaintiffs, it was submitted by their learned counsel that the learned sessions court judge should have found the first defendant 100% to blame or alternatively, at the very least, 75% to blame for the accident because such findings were the natural and logical conclusions to reach regarding liability following her findings that she was "unable to give much credit or weight to the evidence of both the defence witnesses on how the accident occurred", and that "the first defendant was largely to be blamed for the said collision."

[14] It was also submitted on behalf of the plaintiffs that it was wrong for the learned sessions court judge to find the first plaintiff 40% liable since it was the first defendant who so suddenly stopped the bus in the middle of the left lane of a busy highway at a spot, which was not even a bus stop and without any warning at all.

[15] In deciding this ground of appeal it must be recognised that the learned sessions court judge's findings regarding who was to blame for the accident and whether there were any contributing causes for the accident, were essentially findings of fact arrived at by her upon the evidence presented at the trial. In view of the attack levelled by both counsel against the findings of fact arrived at by the learned sessions court judge, I remind myself of the approach an appellate court should take in an instance such as this. That

approach is set out for my guidance in the Privy Council decision of *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 30 MLJ 87 where at p 92 Lord Guest said:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas v Thomas* at p 487:
>
> 'I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'
>
> Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd:*
>
> 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment'
>
> (at p 92 col U — Col 2A–D).

[16] Now, reverting to the findings made by the learned sessions court judge on liability, can it be said that from the reasons given by her or from the evidence relied on by her in doing so, the learned sessions court judge has not taken proper advantage of her having seen and heard the witnesses or in properly evaluating the evidence adduced at the trial? In my judgment the question must be answered with a firm "NO" and I say so for the following reasons.

[17] With regard to her finding that the first defendant was 60% to blame for the accident, a reading of her judgment shows that before she came to such finding, the learned sessions court judge had considered the evidence relating to the conduct of both the first plaintiff and the first defendant on the day in question. Having carefully evaluated the oral and documentary evidence before her, she did not accept the first defendant's and DW2's version of how the accident occurred. Their version was that prior to the accident, the bus had slowed down before stopping to let a passenger alight and that

it was only about one or two minutes after the passenger had alighted that the accident occurred. The learned sessions court judge did not accept what they said and instead came to a finding that the accident was largely caused when the first defendant suddenly stopped the bus to allow a passenger to alight at a place along the main road which was not a bus stop, without giving ample notice to motorist following behind the bus.

[18] In coming to her conclusion the learned sessions court judge gave four reasons why she could not give much credit or attach much weight to the evidence of the first defendant and DW2 regarding how the accident occurred. To summarise she said that:

(1) there was no positive evidence given by the first defendant, whether in his police report (exh D2) or in his evidence-in-chief, about his giving any signal to the left before stopping;

(2) the first defendant had contradicted himself on two material points:

(a) in his examination-in-chief he said that the accident occurred when he was about to give his signal to the right but this changed in his cross-examination when he said the collision occurred after his signal to the right was given, and

(b) the first defendant had tried to explain that because he was nervous he contradicted himself when he said in his cross-examination that the passenger who alighted from the bus was DW2 but when re-examined he said it was not her. However the learned sessions court judge rejected his explanation because from her observation of him while giving evidence, it was unlikely that the first defendant had made a mistake due to nervousness;

(3) the first defendant had not informed the police or the loss adjuster about the existence of DW2 as a witness to the accident. While it was acceptable that the reason the first defendant could have omitted to mention DW2 in his police report was because he had panicked, the learned. sessions court judge found it unacceptable that the same excuse would apply one year later when the first defendant met the loss adjuster;

(4) DW2 had explained in her evidence that the bus had stopped in the middle of the left lane of the road instead of in a bay at the road side because two motor-cycles were parked in the bay. However the learned sessions court judge disbelieved DW2 because she found it inconceivable that DW2 would notice these two motorcycles when the first defendant, as the driver of the bus, never mentioned them at all or gave them as the reason why he did not go into the bay to stop to let the passenger alight.

[19] The findings and reasons given by the learned sessions court judge were subjected to critical scrutiny by counsel for the defendants. In particular her primary finding that the first defendant had made a sudden unscheduled stop and her appreciation of the evidence, including that given by the second plaintiff were attacked. However, I find that the learned sessions court judge did not err or incorrectly appreciate the evidence before her. There was sufficient evidence on which the learned sessions court judge came to her

findings. The first defendant and DW2 had tried to give the impression that the bus did not stop suddenly but had instead slowed down before stopping and had in fact stopped and remained stationary for a few minutes before the accident occurred, but what they said is not borne out by the first defendant's own police report (exh D2) where he said:

> Apabila saya sampai di Batu 6½ Jalan Kuching–Serian, sebab saya menurunkan penumpang di perhentian bas. Oleh kerana itu saya pun terpaksa memberhentikan kenderaan saya. Pada masa yang sama, saya dengar bunyi yang kuat dari arah belakang.

[20] Now the police report was made soon after the accident when the events that occurred would still be fresh in the mind of the first defendant and so what he said in it about the matters he could recollect is highly significant. To my mind when the driver of a bus says that he was forced to stop his bus to allow a passenger to alight at a bus stop and on doing so he immediately heard a loud noise from behind, this constitutes sufficiently clear evidence of the bus coming to an abrupt or sudden stop immediately before the accident. Other evidence (such as the sketch plan) also shows that the stopping occurred at a place along the road which is not a scheduled or designated bus stop and that the bus stopped in the middle of the left lane without moving towards the left or off the road. A further indication that the first defendant was not giving a truthful account of the accident was when he said the collision occurred when he was about to or after he had given a signal to the right to indicate that he was proceeding to the right after letting the passenger alight. But the evidence shows that the first defendant stopped the bus near to the centre of the left lane i.e. he did not go into the bay or move to the left of the road to let the passenger alight. If that be the case then there was no need for the first defendant to give his right signal since he could proceed on his journey without having to get back onto the left lane again to do so.

[21] Given the above evidence it would not be wrong to say that the first defendant had, by abruptly stopping the bus where he did, created a sudden danger on the road which was the main cause of the accident. Therefore the learned sessions court judge did not err when she found the first defendant 60% to blame for the accident. While it is true that the evidence also shows that the first plaintiff had changed lanes before the accident and that he had followed the bus at a speed which was not safe to do so, the learned sessions court judge recognised this fact and that is why she found that the first plaintiff had contributed towards the accident and apportioned 40% of the blame to him but she correctly recognised that the first defendant was largely to blame for the accident because it was he who had created the sudden danger on the road.

[22] I have not overlooked the fact that the first and second defendants' complaint that the second plaintiff's evidence at the trial was far from convincing and that there were discrepancies between what he said in his statements to the police and what he said in court, it is my view that in the evaluation of his evidence, the learned sessions court judge, as the primary trier of fact, was entitled to accord his evidence the weight she did accord to it. Although she was correct to regard the second plaintiff's statement to the

police as a defence exhibit, I agree with counsel for the defendants that the learned sessions court judge was wrong to say that the defence concurred with the version of how the accident happened as put forth by the plaintiff. The defendants clearly did not do so and had requested the production of the second plaintiff's statements to the police to test his credibility. However I find that the error of the learned sessions court judge was not fatal or material to the outcome of this case as she clearly indicated in her judgment that despite what she had said about the defence concurring with the second plaintiff's version to the police of the accident, she went on to base her decision and findings on the other evidence before her.

[23] With regard to the first and second plaintiffs' cross-appeal on liability, it was the submission of their counsel that because the learned sessions Judge did not believe the version given by the first defendant and DW2 on how the accident occurred and she had found that the first defendant was "largely" to be blamed for the accident, the learned sessions court judge was wrong to apportion only 60% of the blame on the first defendant. According to counsel, the learned sessions court judge should have found the first defendant 100% to blame. I regret I cannot agree with this submission. In the first place it would be wrong to equate the word "largely" with "solely", which is obviously what counsel for the plaintiffs is attempting to do. In the second place, when the learned sessions court judge used the word "largely" in her judgment, she had done so advisedly because she pointed out that she was using the word to indicate that the first plaintiff had contributed towards the accident by failing to keep a safe distance from the car in front. Again, on the evidence before her, I find that the learned sessions court judge was fully entitled to find the first defendant 40% to blame for the accident as he was following the bus too closely at a speed which was not safe to do and which prevented him for taking the necessary evasive action after the situation of danger had been created by the first defendant suddenly stopping the bus ahead of the first plaintiff.

[24] It must follow from what I have said that the appeal and the cross-appeal against the learned sessions court judge's finding on liability, must be dismissed.

APPEAL ON AWARD OF DAMAGES

[25] Although the first and second defendants appealed against the whole of the award on damages made by the learned sessions court judge, at the hearing of the appeal counsel for the first and second defendants informed the court that they were confining their appeal to the award for cost of nursing care only.

[26] In making her award under this head of claim for cost of nursing care the learned sessions court judge accepted that the first plaintiff who was 22 years old at the time of trial, could expect to live for another 47 years and so used this figure as the multiplier. In doing so she relied on the medical evidence of three doctors who gave evidence at the trial regarding the first plaintiff's life expectancy. They were:

(i) Dr Lim Ming Ann (PW1) who said that the "life expectancy of Mr Lai could be another 40 years";

(ii) Dr Ching Hing San (PW6) who said that "it is difficult to predict his life expectancy but his injuries would not shorten his life. On average a Malaysian male's life expectancy is 69.4 years";

(iii) Dr Johnical Rayong Ak Ngipa (PW7) who said: "He may have 35–40 years more to live".

[27] The learned sessions court judge apparently preferred the evidence of Dr Ching (PW6).

[28] Having decided that the first plaintiff could expect to live another 47 years, the learned sessions court judge then divided the 47 years into two periods, namely, the first 20 years when the first plaintiff could expect to be looked after by his parents who were 48 years old (mother) and 47 years old (father) respectively (hereafter 'the first period'), and the next 27 years by which time the first plaintiff's parents would not be able to care for him so he would need to be cared for "by the likes of a domestic help or a good nursing home", (hereafter 'the second period').

[29] In making her award for cost of nursing care the learned sessions court judge did so under three sub-heads. They were:

(a) Pre-trial cost of nursing care which she assessed as follows: RM800 per month x 32½ months = RM26,000. The learned sessions court judge adopted a multiplicand of RM800 as she accepted that after the accident the first plaintiff had been cared for by his mother (PW17), who was at the material time earning RM800 a month through tailoring services which business she had to give up to care for the first plaintiff.

(b) In respect of the first period of 20 years the learned sessions court judge assessed the cost of nursing care at RM1,500 per month x 20 years = RM360,000. In deciding to adopt a multiplicand of RM1,500 the learned sessions court judge took into account evidence that Dr Johnical (PW7), was licensed to provide around-the-clock professional home nursing care and that if the first plaintiff was placed in Dr Johnical's care, he would be looked after by three nurses on shift duty at a cost of RM216 per day or RM6,480 per month. However, the learned sessions court judge decided that as the first plaintiff was being well and lovingly cared for by his mother who was assisted by his father, there was no necessity for the first plaintiff to be placed in the full care of Dr Johnical (PW7). Instead, the learned sessions court judge considered that during this first period it would be more reasonable to hire a domestic help to assist the first plaintiff's parents and accordingly assessed the cost of nursing care for the first period of 20 years on that basis. This is what she said:

> In this respect I see no necessity for the first plaintiff to be placed in the full care of PW7, occasionally maybe, to relieve the burden on his parents especially his mother. In his present condition now I would say that the hiring of a domestic help to assist his parents would be a more reasonable finding to make and taking into account the cost of hiring one whilst also taking into consideration PW17's

loss from her gainful employment as a tailor, I would say the sum of RM1,500 per month (contingencies of increased cost considered) would be sufficient for the next 20 years of the first plaintiff's life ie RM360,000 for the total figure (RM1,500 x 12 x20 = RM360,000).

(c) In respect of the second period of 27 years when the first plaintiff's parents would be unable to care for him, the learned sessions court judge assessed the cost of nursing care at RM3,000 x 27 years = RM972,000. The learned sessions court judge gave the following reasons for doing so in her judgment:

> Considering that his parents may not be able to care for him for the next 27 years or so but I still think care by PW7 or some others providing the like of his service may not quite be necessary in the first plaintiff's condition, but conceding that he still needs care, I would say that such care could be given by the likes of a domestic help or a good nursing home. In my view the more reasonable order I would make is to provide for the cost of such a care which I would assess at RMS,000 per month. That figure of course takes into account the accelerated cost of hiring or engaging services 27 years down the line.
>
> Multiplying RM3,000 per month with 12 (months in a year) and 27 years, the award ought to be RM972,000 (RM3,000 x 12 x 27 = RM972,000).
>
> The total award for cost of future nursing care came up to RM1,332,000. The learned sessions court judge then deducted 1/3 from that figure 'for contingencies, vicissitudes of life and accelerated payment' giving an award of RM888,000 for future nursing care.

[30] The first and second defendants as well as the first plaintiff are dissatisfied with the above award. The first and second defendants say the multiplier adopted was wrong, the multiplicand was wrong and the basis of calculation was wrong. As a result the first and second defendants say the learned sessions court judge made an extremely high award, so much so that it is plainly unreasonable.

[31] It is the first and second defendants' case that in arriving at the sum of RM 1,500 per month for cost of future nursing care during the first period of 20 years, the learned sessions court judge had erred because:

(a) if the first plaintiff's mother had been taking care of him for 33 months prior to the trial without a domestic helper, there was no reason why she could not have so continued without a domestic helper after the trial. There was therefore no justification for raising the cost of nursing care from RM800 per month before trial to RM1,500 per month after trial;

(b) if a domestic helper was hired, that person would essentially be taking over the job of the first plaintiff's mother, thereby leaving her free to pursue her business as a tailor if she so wished. According to the defendants, it is the choice of the mother whether or not she returns to her tailoring business, but the defendants should not be made liable to pay an extra RM700 per month for cost of nursing care in the event she does not return to work.

[32] In respect of the second period of 27 years when the first plaintiff's parents are not expected to be able to care for him, the first and second defendants say the learned sessions court judge erred in arriving at a sum of RM3,000 per month for the cost of future nursing care because:

(a) the figure of RM5,000 per month was plucked out of the air without any basis and was entirely speculative;

(b) in doubling the figure from RM1,500 per month to RM3,000 per month, the learned sessions court judge failed to take into account that part of the sum that went into the figure RM1,500 was the mother's income of RM800 per month. According to the defendants, if the mother was no longer around during the second period of 27 years, her income would also no longer be around and there would be no occasion to double that and include it as part of the RM3,000.

[33] On his part, the first plaintiff complains that the award is inadequate and manifestly low and ought to be increased. It is the first plaintiff's case that:

(a) for pre-trial cost of nursing care he should have been awarded RM32,087.64 being RM800 per month for cost of care by his mother (PW17) and another RM200 per month being cost of care by his father (PW16) giving a total of RM1,000 x [976/365] x 12 = RM32,087.64;

(b) for post-trial cost of nursing care he should have been awarded RM2,488,320 being cost of professional nursing care provided by DrJohnical (PW7) at RM6,480 per month over the next 16 years but allowing for 100% contingency to cater for increase in future costs by double the present day costs (following the case *Asainar bin Sainudin & Anor v Mohamad Salam Sidik* [2002] 1 CLJ 396. Thus RM6,480 x 16 x 12 x 2 = RM2,488,320.

(c) Alternatively, using a multiplier of 20 years and a multiplicand of RM6,480 (being the cost of professional nursing care by Dr Johnical (PW7), but without taking into account any contingency for increased costs in future, the award should have been RM1,555,200 being RM6,480 x 20 x 12 = RM1,555,200.

(d) In the further alternative and in a worst case scenario, the first plaintiff submitted that he should not be awarded less than RM864,000 being RM1,800 per month for cost of two care givers such as the first plaintiff's mother at RM800 per month each plus another RM200 per month for the cost of the first plaintiff's father, over 20 years. Thus RM1,800 x 20 x 12 x 2 = RM864,000.

[34] Before considering the merits of the appeal and cross-appeal on cost of nursing care; I must again address myself on the approach an appellate court should take when hearing an appeal against quantum. That approach is conveniently set out in *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 where his lordship Abdul Hamid CJ speaking for the Supreme Court said:

Now, in an appeal on quantum of damages it is essential in order to come to a conclusion to bear in mind certain principles which are well established. The appeal court is slow, disinclined to interfere with the judge's finding merely because the appeal court thinks that if the case had been before it in the first instance a lesser sum would have been awarded. Azmi CJ (Malaya) (as he then was) giving the judgment of the Federal Court in *Topaiwah v Salleh* said that:

'... so far as this court is concerned we should, to paraphrase Greer LJ in *Fling v Lovell* be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case. (See *Fling v Lovell*)'

In *Greenfield v London and North Eastern Railway Company*, Mackinnon LJ had this to say:

'The principle on which the Court of Appeal reviews the assessment of damages, whether too high or too low, is not because the Court of Appeal might have given rather more or rather less, but only (1) if the judge has omitted some relevant consideration or admitted some irrelevant consideration, or (2) if the amount is so excessive, or insufficient, as to be plainly unreasonable.'

Lord Evershed MR in *Wilson v Pilley* emphasized that:

'Interference by this court with an award of damages by the trial judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the county court. No one would suggest that, because this court thought that the damages small in any case, were rather on the low side, this court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one.'

We would also refer to *Elliott v Preston* where Salmon LJ had this to say:

'Before we can interfere, there has to be (in the phrase which is hallowed, but has now I think a rather archaic ring) a wholly erroneous estimate of damage. That I have always regarded as meaning that a court has to be satisfied that it is very wrong. If you are satisfied that it is wrong, and seriously wrong, then not only is this court entitled to interfere, but it is its duty to interfere. I would agree ... that you cannot say, if it is wrong by such and such a percent, you do interfere, and if it is not you do not. I think each case stands by itself, and a great deal depends upon the amount of the award.'

The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the Judge to consider some relevant materials, or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or

convinced that the Judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial Judge.

[35] Reverting to the question at hand, I wish to begin by considering first the question of the appropriate multiplier or number of years purchase. In making her award the learned sessions court judge had adopted a multiplier of 47 years. Mr Frank Tang of counsel for the defendants has very helpfully in his submissions set out a survey of Malaysian cases on awards made in respect of cost of nursing care which show that our courts have adopted at least five different approaches in determining the multiplier in assessment of cost of nursing care in cases where a person is prognosed to require nursing care for the rest of his life. The five approaches are:

(i) applying a direct multiplier of 16 years, following *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99. Other cases which have applied this approach are *Asainar bin Sainudin & Anor v Mohamad Salam bin Sidik* [2002] 5 MLJ 104; *Mohd Yusof bin Abdul Ghani v Tee Song Kee & Anor* [1995] MLJU 344; *Muhammad Milshaddiq bin Juri v Rahmat bin Jamil* [1993] MLJU 418; *Swee Boon King v Thong Tin Sing & Anor* [1994] MD 1224 and *Chandran v Mohammad Razali bin Jaafar* [1992] MD 911;

(ii) applying a direct multiplier not limited to 16 years. Some cases that have adopted this approach are *Zamri Md Som & Anor v Nurul Fitriyaton Idawiyah Nahrawi* [2002] 1 CLJ 309; *Wong Li Fan William (an infant) v Haidawati bte Bolhen & Anor* [1994] 2 MLJ 497;

(iii) by taking the life expectancy minus age at the time of accident and using a direct multiplier. The cases that have adopted this approach are *Tan Ah Kan v The Government of Malaysia* [1997] 2 AMR 1382; *Ng Chun Loi v Hadzir & Ors* [1993] 1 CLJ 323;

(iv) by taking the life expectancy minus age at time of the accident less one-third for contingencies and using direct multiplier. The cases that have adopted this approach are *Chandra Sekaran a/l Krishnan Nair & Anor v Ayub bin Mohamed & Anor* [1994] MLJU 82; *Zainab bte Ahmad lwn Keretapi Tanah Melayu Bhd* [2000] 5 MLJ 620; *Nazori bin Teh & Anor v Teh Lye Seng & Anor* [1996] 1 AMR 706;

(v) by taking life expectancy minus age at the time of accident and using annuity tables with no deduction for contingencies. Cases that have adopted this approach are *Yu Mea Lian & Anor v Government of Terengganu & Ors* [1997] MLJU 252; *Inderjeet Singh v Mazlan bin Jasman* [1995] 2 MLJ 646.

[36] Reverting to the facts of our case and looking at what the learned sessions court judge awarded in this case, I agree with counsel for the defendants that she had adopted approach (iv) in arriving at her award for cost of future nursing care.

[37] Was the learned sessions court judge wrong in adopting a multiplier of 47 years? Counsel for the defendants says that she should have accepted

a life expectancy of 40 years and not 47 in this case. I regret I cannot agree with this submission. In my view the learned sessions court judge was entitled to accept the evidence of Dr Ching Hing San that the first plaintiff's injuries would not shorten his life and that the average Malaysian male's life expectancy is 69.4 years. There was also evidence before the court that the first plaintiff was being well cared for and had shown marked progress in his condition and so there is every reason to believe that what Dr Ching said will be borne out. In the circumstances, it was not unreasonable for the learned sessions court judge to accept 47 years as the multiplier.

[38] I next consider whether the learned sessions court judge had applied the wrong multiplicand. On this question, I would like to deal first with the first plaintiff's cross-appeal. The amounts which he says he should have been awarded for cost of future nursing care, ie RM2,488,320 or alternatively RMl,555,200 are calculated using a multiplicand of RM6,480 per month which is cost if the first plaintiff is professionally cared for by Dr Johnical (PW7) and thereafter applying a 100% contingency for increase of future costs. In fact, the main thrust of the first plaintiff's submissions on this point is that the learned sessions court judge should have found that the first plaintiff should be placed under the care of Dr Johnical.

[39] Now, a reading of the learned sessions court judge's judgment shows that despite the submissions made to her on the point by counsel for the first plaintiff, she came to a finding that it was not necessary for the first plaintiff to be provided professional nursing care by Dr Johnical because 'based on the tremendous progress the first plaintiff had made and his appearance in court the loving care lavished on the first plaintiff by his parents was definitely beneficial to his well-being'. And the learned sessions court judge went on to say that it was not necessary for the first plaintiff to be placed in the full time care of Dr Johnical because 'it appears to me that they (his parents) were able to nurse and care for him ... despite their lack of formal nursing training'. In the circumstances the learned sessions court judge came to a finding that it would be more reasonable to allow for the cost of hiring a domestic help to assist the first plaintiff's parents.

[40] In my judgment, there was sufficient evidence before the learned sessions court judge to enable her to arrive at her finding on the point. She was entitled to rely on the evidence given by Dr Lim Ming Ann (PW1) about the significant improvement to the first plaintiff's physical condition. Dr Lim said that this is what he found from his brief examination of the first plaintiff just before he gave evidence in court. There was also the evidence of Dr Ching Hing San regarding the first plaintiff's improved condition, and all this while under the loving care of the first plaintiff's parents, particularly the mother. There was also the learned sessions court judge's own observation of the first plaintiff in court from which she was able to arrive at her finding. I accordingly find no merit in the first plaintiff's contention that he should have been awarded RM2,488,320 or alternatively RM1,555,200 for cost of future nursing care. With regard to the first plaintiff's submissions that the learned sessions court judge should have allowed a 100% contingency to cater for increase in future costs as was done in *Asainar*'s case, it is my view that each case must be decided

on its own facts and that *Asainar*'s case was not trying to lay down any principle of general application. It should not be overlooked that in that case the court was there dealing with a very young plaintiff and trying to do justice as best it could in the circumstances of that case. On my part, I would refer to the cautionary words of Lord Scarman in *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910, on trying to cater for the risk of future inflation in assessing an award for cost of future nursing care. This is what Lord Scarman said at p 922:

> ... the estimate of damages under this head must proceed on the basis that resort will be had to capital as well as income to meet the expenditure.

[41] Lord Scarman further said at p 923:

> .... the correct approach should be, therefore, in the first place to assess damages without regard to the risk of future inflation. If it can be demonstrated that, on the particular facts of a case, such an assessment would not result in a fair compensation (bearing in mind the investment opportunity that a lump sum award offers), some increase is permissible.
>
> But the victims of tort who receive a lump sum award are entitled to no better protection against inflation than others who have to rely on capital for their future support. To attempt such protection would be to put them into a privileged position at the expense of the tortfeasor, and so to impose on him an excessive burden, which might go far beyond compensation for loss.

[42] Counsel for the first plaintiff also referred me to several cases on cost of future nursing care, decided by the courts in other common law jurisdictions. While I am grateful to him in doing so, I feel that they are useful as a guide or indication as to the trend and policies in those countries and reflective of conditions there, and not necessarily of what should apply in our jurisdiction.

[43] With regard to the first plaintiff's contention that in a worst case scenario he should not be paid anything less than RM864,000, I find no merit in this contention as the amount referred to is calculated on the basis of two care givers at RM800 per month each and a contingency of 100% for increase in future costs. The basis for this contention is that because both his mother and father care for him, the first plaintiff should be entitled to the cost of two carers at RM800 per month each (based on the mother's monthly earnings). I regret that the flaw in this contention is that it assumes as a fact that the first plaintiff is cared for by both his parents at the same time when this is not so. The evidence shows that it is the first plaintiff's mother who cares for him full time and that his father only assists his mother in doing so. I should also point out that in the first plaintiff's calculations, it still includes RM200 for the father. So in fact, he is claiming for the cost of three care givers.

[44] I accordingly find no merit in the first plaintiff's cross-appeal and dismiss it.

[45] Turning now to the first and second defendants' appeal on this point I must at once say that I cannot agree with their contention that it was wrong for the learned sessions court judge to arrive at a multiplicand of RM1,500 per month for the first period of 20 years because for the reasons given by

them, there was no justification for raising the cost of nursing care from RM800 per month before trial to RM1,500 per month after trial. In my judgment, the learned sessions court judge was fully justified in doing so for the following reasons:

[46] First, there was evidence before the court that the sheer effort of caring for the first plaintiff was taking a heavy toll his mother. Also, the fact that the first plaintiff had benefited from all the care and attention he received from his parents is I think indisputable, but the learned sessions court judge correctly recognised that for the first plaintiff to continue to be cared for and attended to at the standards he presently enjoyed, his mother would definitely need to hire a domestic help to assist her in caring for him. So, the defendants' complaint that if his mother could look after him before the trial, there was no reason why she could not continue to do so after the trial is not a good argument in the light of the 'draining' effect it is having on the mother.

[47] Secondly, I do not accept the defendants' contention that if a maid is employed, the first plaintiff's mother would be free to resume her business as a tailor. As the learned sessions court judge correctly pointed out, the hiring of a maid was only to assist the first plaintiff's parents — not to replace the mother's services or to take over his care from her. In my view unless the first plaintiff is put under professional nursing care of a person like Dr Johnical, the plaintiff's mother will bear the primary responsibility for his care, even after a maid is hired.

[48] In the third place, counsel for the defendants submitted that it would not cost RM700 per month to hire a maid in Kuching and that the court may take judicial notice that it would cost RM500 per month to hire a maid in Kuching. I regret I cannot agree. While it may be the norm to be able to hire a maid for RM500 per month in Kuching we are here talking about hiring a maid to assist in caring for a person in the physical condition of the first plaintiff and I have no doubt that it would cost more to hire a maid for the first plaintiff's purposes. In the circumstances I find the learned sessions court judge's estimate reasonable. I see no reason to disturb the learned sessions court judge's award under this sub-head, subject to what is said later on in this judgment regarding the appropriate award or order to make.

[49] With regard to the learned sessions court judge's award of RM3,000 per month for the second period of 27 years when the first plaintiff's parents are not expected to be able to cater for him, I think counsel for the defendants is on firmer ground here. While I do not think the learned sessions court judge was wrong in saying that the first plaintiff's parents would not be able to care for him 20 years from now and that instead of having the first plaintiff cared for by professionals like Dr Johnical it would be more reasonable to have him cared for by a domestic help (or good nursing home), I agree with counsel for the defendants that the learned sessions court judge has not explained on what basis she arrived at a figure of RM3,000 per month as the 'accelerated cost' of hiring a maid 27 years 'down the line' and so her award for this second period of 27 years cannot be supported. Since the learned sessions court judge had found that the first plaintiff's mother needed a maid

to assist her in caring for the first plaintiff over the first period of 20 years, and since she also found that for the second period of 27 years, it would still be more reasonable for him to be cared for by a maid instead of by a professional like Dr Johnical then it would be reasonable to conclude that for the second period of 27 years the cost of his nursing care would be no different from the first period of 20 years, ie essentially the cost of two maids. That being the case as cost of care had been assessed at RM1,500 per month for the first period of 20 years, the learned sessions court judge should have made an award for both periods by taking the life expectancy of the first plaintiff of 47 years, discounting 1/3 for contingencies thereby giving 31 years and then applying the multiplicand of RM 1,500 per month for the whole period.

[50] I would accordingly allow the appeal against the award for the second period of 27 years and vary the award for cost of post trial future nursing care of RM588,000 made by the learned sessions court judge in respect of the first plaintiff in the following manner:

Life expectancy	69.4 years
Age at time of trial	22 years
	47 years (rounded off)
Less $^1/_3$ for contingencies	16 years
	31 years

Cost for nursing care for 31 years:

31 x 12 x RM1.500 = RM558,000.

To summarise: For pre-trial cost of nursing care:	RM26,000
For post-trial cost of nursing care:	RM558,000

[51] I confirm the learned sessions court judge's award of interest on the above amounts.

[52] Before concluding, I wish to deal with the first plaintiff's cross-appeal on the pre-trial cost of nursing care. He claimed a sum of RM200 should have been awarded for his father also. I regret I find no merit in this ground. The evidence shows that the first plaintiff's father assisted his mother to care for him — he was not a full time carer like his mother. In the circumstances the learned sessions court judge was correct not to allow the cost of the first plaintiff's father.

[53] Finally, the question of costs. The first and second plaintiff's applied for costs for two counsels but this was disallowed by the learned sessions court judge. They have cross-appealed against that order. Having read the notes of proceedings and the judgment, I do not think this was a complex or complicated or difficult case whether on the law or on the facts. There was nothing to justify the award of costs of two counsels in this case. The learned sessions court judge was not wrong to exercise her discretion against granting such an order. I would accordingly dismiss the cross-appeal against the order made in respect of costs.

[54] With regard to the costs of this appeal, I will hear the parties on the appropriate order to make.

Order accordingly.

Reported by I Izzuddin

A

B

C

D

E

F

G

H

I